Foong Yeen Keng v Assunta Hospital (M) Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R1–12–195 OF 1997
RAUS SHARIF J
1 DECEMBER 2005

Civil Procedure — Appeal — Retrial — Trial judge did not substantiate her findings with reasons — Whether order for retrial appropriate

Tort — Negligence — Professional negligence — Medical practitioner — Standard of care — Whether the doctor has been proven guilty of such failure as no doctor of ordinary skill acting with ordinary care would be guilty of — Exercise of clinical decision — Difference of opinion — Whether can constitute basis for a conclusion of negligence

Tort — Negligence — Professional negligence — Medical practitioner — Res ipsa liquitor — Whether the fact that a patient came out of a hospital in a worse condition before admittance constitute proof of negligence by the hospital staff

The appellant suffered a severe pain in the lower abdominal area. She sought advice and treatment in a private clinic. At the private clinic, she was referred to Assunta Hospital, the first respondent ('hospital'). At the hospital, the appellant was given a medical check-up and thereafter admitted. A short while later she was operated for appendicitis by Dr AK Sabapathy, the second respondent ('Dr Sabapathy'). During the operation, Dr Sabapathy found that the right ovarian cyst had ruptured. The appellant's ovarian cyst as well as the appendicitis was then removed. After the operation, the appellant was admitted to the ward. While at the hospital, she was managed by Dr Sabapathy until he went on leave. During the period Dr Sabapathy was away, the appellant was managed by a consultant surgeon Dr KT Lim. After the operation the appellant was experiencing tremendous pain. When Dr Sabapathy returned from his leave, he suggested for a second operation ('laparatomy'). The appellant underwent a second operation and pus was found in the right paracolic gutter and was cleared. The appellant was subsequently discharged from the hospital and went for follow-up checked-ups. According to the appellant, that on the third visit, Dr Sabapathy told her that it was not necessary for her to come back and she could see other clinic for dressing. The appellant then sought and underwent further treatment and medical attention to reduce her abdominal pain. The appellant later filed a claim against the hospital and Dr Sabapathy for breach of contractual duty and/or professional negligence and/or breach of duty of care of both of them resulting in the appellant suffering internal injuries, endured pain and mental anguish and has been put to loss and expense. Both the hospital and Dr Sabapathy denied the allegations. This was an appeal against the decision of the session court judge ('trial judge') who had dismissed the appellant's claim against both the respondents.

Held dismissing the appeal:

(1) The trial judge did not substantiate her findings with reasons. An easy way out in this kind of situation was for the court to order a retrial. But in view that the cause of this action arose in 1985 and the fact that the case had been delayed for a considerable time, it was not in the best interest of all parties concern and above all justice, that the case be sent back to the session court to be heard again by another judge. In view of this, the court decided to approach the appeal by examining the record whether there were enough materials to support the conclusion of the trial judge that on the balance of probabilities the appellant had failed to prove her case or whether there were sufficient evidence to support the appellant's claims that the hospital and/or Dr Sabapathy was negligent (see paras 19–20).

(2) Dr Sabapathy had not failed to insert a corrugated drain after the first operation (see para 25). Therefore, the contention of Dr Sabapathy altered the record, was rightly rejected by the trial judge. Dr Sabapathy was not altering the medical records or tampered with evidence. He was merely recording what transpired in relation to the operation conducted on the appellant (see para 29).

(3) Dr Sabapathy had not failed to ensure immediate administration of antibiotic after the operation. The antibiotic was in fact administered on the appellant (see para 36). The hospital could not be said to be negligent for failure to properly administer adequate and correct antibiotics to prevent post operative infections (see para 38). Failure to complete notes did not indicate negligence. There was ample evidence supporting the hospital's contention that the medicine prescribed had been dispensed. If anything, it indicated a recording carelessness of the nurses but it was not negligence (see para 49).

(4) The appellant was not left unattended. Conservative treatment was adopted by Dr KT Lim. Sufficient time had to be given in order to determine whether conservative treatment was working on the appellant. Therefore, whether early laparatomy must be carried out instead of adopting conservative treatment was a clinical decision. Different opinion always exists. If one treatment overtakes the other and goes wrong, it cannot be a basis for a conclusion of negligence. Thus, if there was a delay, the delay was due to the conservative treatment undertaken by Dr KT Lim (see paras 53–55). The appellant's expert may have a different view on this matter. But the different of opinion as to the treatment of a patient, does not make a doctor negligent merely because his opinion leading to his diagnosis differs from that of other doctors. What is important is he acts with the ordinary care and skill of a doctor with his qualification (see para 57). Therefore, the allegation made by the appellant in respect of the conservative treatment, timing of the second operation and the early laparatomy all involved clinical judgment. The hospital cannot be faulted where such judgments were exercised (see para 59).

(5) The maxim of res ipsa loquitor or 'the things speaks for itself' was not applicable in this case (see para 60). The fact that the patient came out of a hospital in a worse condition before admittance does not constitute proof of negligence by the hospital staff. One must be able to accept that medical

treatment carries the risk and the occurrence of injury was not necessarily evidence of lack of reasonable care (see para 62).

[Bahasa Malaysia summary

Perayu mengalami kesakitan yang teruk pada bahagian bawah abdomen. Beliau meminta nasihat dan rawatan dari sebuah klinik swasta. Klinik swasta tersebut, merujuk beliau ke Hospital Assunta, responden pertama ('hospital'). Semasa di hospital, satu pemeriksaan perubatan dibuat ke atas perayu dan kemudian dari itu beliau diwadkan. Sejurus selepas itu, beliau dibedah untuk apendiks oleh Dr AK Sabapathy, responden kedua ('Dr Sabapathy'). Semasa pembedahan, Dr Sabapathy mendapati sista ovari kanan telah pecah. Sista ovari perayu dan juga apendiksnya telah dibuang. Selepas pembedahan, perayu dimasukkan ke wad. Semasa di hospital, beliau telah diletakkan di bawah penjagaan Dr Sabapathy sehinggalah beliau pergi bercuti. Sepanjang percutian Dr Sabapathy, perayu dijaga dibawah pakar bedah Dr KT Lim. Selepas pembedahan tersebut perayu mengalami kesakitan yang teruk. Apabila Dr Sabapathy pulang dari percutian beliau, beliau mencadangkan pembedahan yang kedua ('laparatomi'). Perayu menjalani pembedahan yang kedua dan nanah dijumpai di bahagian kanan talang parakolic dan telah dibersihkan. Perayu kemudiannya dibenarkan keluar dari hospital dan membuat pemeriksaan rawatan lanjutan. Menurut perayu, pada lawatan ketiga, Dr Sabapathy memberitahu beliau bahawa beliau tidak perlu lagi datang dan boleh pergi ke klinik lain untuk menukar balutan. Perayu kemudiannya telah pergi mendapatkan rawatan lanjut untuk mengurangkan kesakitan pada abdomennya. Perayu kemudiannya memfailkan satu tuntutan terhadap hospital dan Dr Sabapathy kerana mengingkari tanggungjawab kontrak dan/atau kecuaian profesional dan/atau pengingkaran tanggungjawab berjaga-jaga yang mana telah menyebabkan perayu mengalami kecederaan dalaman, kesakitan dan kesengsaraan dan juga kerunsingan mental dan mengalami kerugian perbelanjaan. Hospital dan Dr Sabapathy, kedua-duanya menafikan dakwaan-dakwaan tersebut. Ini merupakan rayuan terhadap keputusan hakim mahkamah sesyen ('hakim bicara'), yang menolak tuntutan perayu terhadap kedua-dua responden.

Diputuskan, menolak rayuan tersebut:

(1) Hakim bicara tidak menyokong keputusannya dengan sebarang sebab. Satu jalan keluar yang senang dalam situasi seperti ini adalah untuk mahkamah memerintahkan satu perbicaraan semula. Tetapi memandangkan yang kausa tindakan berlaku dalam tahun 1985 dan kes ini telah tertangguh untuk masa yang agak lama, ianya bukan bagi kepentingan semua pihak yang berkenaan dan juga keadilan terutamanya, yang kes ini dihantar semula ke mahkamah sesyen untuk dibicarakan semula oleh hakim yang lain. Memandangkan keadaan ini, mahkamah memutuskan untuk mendekati rayuan ini dengan meneliti rekod sama ada terdapat material yang mencukupi untuk menyokong keputusan hakim bicara pada imbangan kebarangkalian yang perayu telah gagal membuktikan kes beliau atau sama ada terdapat keterangan yang mencukupi untuk menyokong tuntutan perayu bahawa pihak hospital dan/atau Dr Sabapathy telah cuai (lihat perenggan 19–20).

(2) Dr Sabapathy tidak gagal untuk memasukkan saluran berombak selepas pembedahan pertama (lihat perenggan 25). Dari itu, dakwaan yang mengatakan Dr Sabapathy telah mengubah rekod, telah diketepikan dengan betul oleh hakim bicara. Dr Sabapathy tidak meminda rekod perubatan atau mengubahkan keterangan. Beliau hanyalah merekodkan apa yang telah berlaku berhubung dengan pembedahan yang telah dilakukan ke atas perayu (lihat perenggan 29).

(3) Dr Sabapathy tidak gagal untuk memastikan yang antibiotik diberikan secepatnya selepas pembedahan tersebut. Antibiotik memangnya telah diberikan kepada perayu (lihat perenggan 36). Pihak hospital tidak boleh dikatakan bertindak cuai atau gagal untuk memberikan antibiotik yang mencukupi dan betul bagi menghalang jangkitan selepas pembedahan (lihat perenggan 38). Kegagalan untuk mengambil nota yang cukup tidak menunjukkan kecuaian. Terdapat cukup keterangan yang menyokong dakwaan hospital bahawa ubat yang dipreskripkan telah dikeluarkan. Jika apa pun, ianya menunjukkan kecuaian merekod jururawat-jururawat dan bukannya kecuaian (lihat perenggan 49).

(4) Perayu tidak ditinggal tanpa jagaan. Rawatan konservatif telah digunapakai oleh Dr KT Lim. Masa yang mencukupi telah diberikan untuk menentukan sama ada rawatan konservatif berkesan ke atas perayu. Oleh yang demikian, sama ada laparatomi yang awal mesti dijalankan di sebalik menggunapakai rawatan konservatif adalah satu keputusan klinikal. Pendapat yang berbeza sentiasa ada. Jika satu rawatan dibuat di sebalik satu yang lain dan ianya tidak berjalan lancar, ianya tidak boleh menjadi asas untuk memutuskan kecuaian. Dari itu, jika terdapat kelewatan, kelewatan tersebut disebabkan oleh rawatan konservatif yang dibuat oleh Dr KT Lim (lihat perenggan 53–55). Pakar bagi pihak perayu mungkin mempunyai pendapat yang berbeza mengenai perkara ini. Akan tetapi pendapat yang berbeza mengenai rawatan seorang pesakit tidak menjadikan seorang doktor itu cuai hanya kerana pendapatnya yang menjurus kepada diagnosis berbeza dari doktor-doktor lain. Apa yang penting ialah beliau bertindak dengan kewajipan berjaga-jaga dan menggunakan kemahiran kebiasaan seorang doktor yang berkelulusan sepertinya (lihat perenggan 57). Oleh yang demikian, dakwaan yang dibuat oleh perayu berhubung dengan rawatan konservatif itu, masa pembedahan kedua dibuat dan laparatomi yang awal kesemuanya melibatkan keputusan klinikal. Pihak hospital tidak boleh dikatakan bertanggungjawab bilamana keputusan-keputusan seperti itu dibuat (lihat perenggan 59).

(5) Maxim res ipsa loquitor atau 'perkara-perkara sudah jelas dengan sendirinya' tidak terpakai dalam kes ini (lihat perenggan 60). Fakta yang pesakit keluar dari hospital berada dalam keadaan yang lebih teruk berbanding dari keadaan sebelum masuk hospital tidak menjadi bukti kecuaian pihak hospital. Perlulah diterima bahawa rawatan perubatan membawa risiko dan kejadian kecederaan tidak semestinya merupakan satu keterangan kekurangan penjagaan yang munasabah (lihat perenggan 62).]

Notes

For cases on retrial, see 2(1) *Malllal's Digest*(4th Ed, 2004 Reissue) paras 1291–1292
For cases on professional negligence, see*Mallal's Digest*(4th Ed, 2002 Reissue) paras 945–1013

Cases referred to

British Railway Co (1923) SC (HL) 53 (refd)
Cassidy v Ministry of Health [1951] 1 AII ER 577 (refd)
Hornal v Neuberger Products Ltd [1957] 1 QB 247 (refd)
Hucks v Cole and Author [1968] 112 SJ 483 (refd)
Mahon v Osborne [1939] 2 KB 14 (refd)
Schanczl v Singh [1988] 2 WWR 465 (refd)

Appeal from: Summons No P–25–1251 of 1986 (MS/KL55/90) (Sessions Court, Kuala Lumpur)

Mohd Shafee Abdullah (Frida Krishnan and Azlena Maria with him) (Shafee & Co) for the appellant.
Edmund Bon (LY Choi with him) (Chooi & Co) for the first respondent.
PS Ranjan (MS Dhillon with him) (PS Ranjan & Co) for the second respondent.

Raus Sharif J:

[1] This is an appeal against the decision of the learned session court judge ('trial judge') made on 2 August 1997, who had dismissed the appellant's claim against both respondents.

[2] On 30 October 2004, after hearing the parties, the appellant's appeal was dismissed. I now give my reasons.

[3] The background facts of this case are these. On 20 December 1985, the appellant was suffering a severe pain in the lower abdominal area. She sought advice and treatment in a private clinic at Jalan Klang Lama. At the private clinic, she was examined by Dr Leong Kok Weng, who later referred her to Assunta Hospital, the first respondent ('hospital').

[4] At the hospital, the appellant was given a medical check-up and thereafter admitted. A short while later she was operated for appendicitis by Dr AK Sabapathy, the second respondent ('Dr Sabapathy'). During the operation, Dr Sabapathy found that the right ovarian cyst had ruptured. The appellant's ovarian cyst, as well as the appendicitis was then removed.

[5] After the operation, the appellant was admitted to the ward. While at the hospital, she was managed by Dr Sabapathy until he went on leave on 28 December 1985. During the period Dr Sabapathy was away, the appellant was managed by a consultant surgeon Dr KT Lim.

[6] After the operation the appellant was experiencing tremendous pain. When Dr Sabapathy returned from his leave on 6 January 1986 he suggested for a second operation (laparatomy). The appellant underwent a second operation on 7 January 1986 and pus was found in the right paracolic gutter and was cleared.

[7] The appellant was discharged from the hospital on 18 January 1986 and went for follow-up checked-ups on 21 January 1986, 28 January 1986 and 25 February 1986.

[8] According to the appellant, that on the third visit, Dr Sabapathy told her that it was not necessary for her to come back and she could see other clinic for dressing. The appellant then sought and underwent further treatment and medical attention at Tung Shin Hospital, Klinik Ng Lee, Klinik Sri Gombak and Dr Leela Ratos at Kuala Lumpur to reduce her abdominal pain.

[9] In this suit, the appellant is claiming against the hospital and Dr Sabapathy for breach of contractual duty, professional negligence and/or breach of duty of care resulting in the appellant suffering internal injuries, endured pain and mental anguish and been put to loss and expense. Both the hospital and Dr Sabapathy denied the allegations.

[10] At the trial the following witnesses were called:

For the appellant

(i) Foong Yee Keng (PW1) — appellant;

(ii) Dr Muthukumaran (PW2) — consultant surgeon at Tung Shin Hospital; and

(iii) Foong Chong Keng (PW3) — appellant's father

For the respondents

(i) Dr AK Sabapathy (DW1) — second respondent;

(ii) Dr Leong Kok Weng (DW2) — doctor who referred the appellant to the hospital;

(iii) Dr Kylasa Somasundram (DW3) — consultant surgeon at Tawakal Hospital;

(iv) Theresa Pangajshi (DW4) — night supervisor at the hospital;

(v) Kamalasani a/p Nadarajah (DW5) — head of Pharmacy at the hospital; and

(vi) Lee Chong Hing (DW6) — medical superintendent at the hospital.

[11] On 2 August 1997, the appellants' claims were dismissed by the trial judge.

[12] Before me the main complaint of the appellant was failure on the part of the trial judge to consider that negligence was proven against the hospital and Dr Sabapathy with respect to:

(a) the two operations; and

(b) the management of the appellant during operation and post operation.

[13] With respect to Dr Sabapathy it is the appellant's contention that Dr Sabapathy:

(i) Failed to insert a corrugated drain to drain the wound in the first operation which by itself had brought about those infections and that he failed to indicate that a drain if ever was really inserted;

(ii) altered the medical records and tampered with evidence; and

(iii) failed to ensure immediate administration of antibiotic after the operation.

[14] With respect to the hospital it was the appellant's contention that the hospital had through its servants and/or agents:

(i) negligently managed the two operations of the appellant; and

(ii) negligently managed the appellant in post operation treatment and care.

[15] At the outset, Dato' Shafee leading counsel for the appellant complained that there was 3½ years delay on the part of the trial judge in making the decision and judgment. He further complained that there are no grounds found in the judgment. In other words, he is contending that the judgment is a non speaking judgment. Thus, he submitted that the principle that the appellate court should be slow in interfering with the findings of facts of the court of first instant should not be applicable in this appeal. Hence, he is urging this court to consider the issues afresh based on the evidence available in the record of appeal. According to him, there are sufficient evidence to support the appellant's claims against the hospital as well as Dr Sabapathy, thus he urged this court to find in favor of the appellant.

[16] Leading counsel for Dr Sabapathy, Mr PS Ranjan contended that even if the judgment is a non-speaking judgment, there are enough materials for this court to support the findings of the trial judge. Accordingly, he urged this court to dismiss the appellant's appeal with costs.

[17] Leading counsel for the hospital, Mr Edmund Bon was of the same mind with Mr PS Ranjan. According to Mr Edmund Bon, there are materials before this court to justify the decision of the trial judge that on the balance of probabilities, the appellant had failed to prove her case.

[18] To appreciate the arguments of counsels it is necessary to look at what the trial judge said in her grounds of judgment. The trial judge after setting out the facts stated the following:

> Daripada keterangan saksi dan dokumen yang dikemukakan khususnya kad-kad seperti 'cardex card' bagi ubatan yang diberi (exh D31); dan suntikan ('injection') yang diberi (exh D35), dan 'observation chart' (exh P9Ac) jelas bahawa rawatan telah diberi oleh pihak DF1. Dari rekod yang diperolehi daripada kad-kad ini jelas jagaan yang dijangka telah pun diberi oleh DF1. Exhibit P14 ('Doctor's Order Sheet') dan exh P8 ('Medicine Sheet') menunjukkan ubatan telah diberi oleh DF 1 seperti diarah oleh DF2, doktor yang bertanggungjawab menjaga plaintif. Seterusnya semasa DF1 bercuti seorang doktor lain telah menjaga plaintif. Bagi pihak DF2 pula semasa ia bercuti seperti dikatakan, seorang

doktor lain telah menjaga plaintif. DF2 telah melakukan kedua-dua pembedahan yang difikir perlu bagi plaintif. Dari keterangan DF2 sendiri dan saksi pakarnya, DW3, tidak didapati yang DF2 telah cuai atau mengabaikan tugas/tanggungjawabnya terhadap plaintif. Saya setuju dengan hujah pihak defendan bahawa:

(i) But in case of surgeon, he does not guarantee a cure. His undertaking is to exercise reasonable care and skill and diligence in attempting to achieve the desired result. Surgeon attempts but cannot be taken too far e.g. if he were to operate on the right leg he could not get away by operating on the left leg…. DF2 had done his part — operate etc. and have a case managed by one other surgeon but complication could still occur;

(ii) '… the standard of care which the law requires is not an insurance against accidental slips. It is such a degree of care as a normally skilful member of the profession may reasonably be expected to exercise in that actual circumstances of the case in question. It is not every slip or mistake which imports negligence and in applying the duty of care of a surgeon, it is peculiarly necessary to have regard to the different kinds of circumstances that may present themselves for urgent attention.' — Scott LJ in *Mahon Osborne* [1939] KB 14, 31.

Seterusnya 'a high standard of proof is required in a professional negligence action.' Dalam kes *Hucks v Cole*, Lord Denning MR di ms 6 menyatakan:

> A charge of negligence against a medical man, a solicitor or any other professional man, stands on a very different footing from a charge of negligence against a motorist or an employer. The reason is because the consequences for the professional man are far more grave. A finding of negligence affects his standing and reputation. It impairs the confidence which his clients have in him. The burden of proof is correspondingly greater. The principle applies that 'in proportion as the charge is grave, so ought the proof to be clear (see *Hornal v Neuberger Products Ltd* [1957] 1 QB 247).

In the *Vancouver General Hospital* case, the Privy Council applied an even higher standard of proof stating as follows:

> Now the onus is on the respondent to prove beyond reasonable doubt the negligence of which she complains.

Saya dapati yang 'standard of care test' bagi tuntutan kes kecuaian telah pun dipenuhi oleh kedua-dua DF1 dan DF2. Jadi saya tidak dapati apa-apa yang menunjukkan kedua-dua defendan atau mana-mana daripada mereka telah gagal menjalankan tanggungjawab atau cuai dalam menjalankan tanggungjawab seperti yang dituntut oleh plaintif.

Berkenaan dengan kebenaran ('consent') untuk kedua-dua pembedahan itu, saya dapati bahawa plaintif telah memberi kebenaran bagi pembedahan pertama. Fakta yang tidak dinafikan yang kes plaintif ini adalah kes kecemasan membuktikan yang plaintif tiada pilihan apabila ia datang ke DF1 dan DF2 pada 20 Disember 1985. Pembedahan terpaksa dilakukan. Exhibit P2 jelas menunjukkan yang plaintif telah memberi kebenaran untuk pembedahan pertama.

Berkenaan pembedahan kedua, plaintif menyatakan 'I cannot recollect whether I consented to the operation or not.' Daripada keterangan, jelas plaintif telah memberi kebenaran dan menyatakan 'After 20 December 1985 I don't remember if I ever complained that the operation was done without my consent.'

Oleh yang demikian atas imbangan kebarangkalian, kebenaran telah diberi oleh plaintif bagi kedua-dua pembedahan.

Dengan sebab-sebab yang diberi itu saya telah menolak tuntutan plaintif yang kedua DF1 dan DF2 cuai dan tidak bertanggungjawab dan oleh itu menolak tuntutan plaintif dengan kos.

[19] With respect, I have to agree that the trial judge did not substantiate her findings with reasons. An easy way out in this kind of situation is for this court to order a retrial. But in view that the cause of this action arose in 1985 and the fact that the case had been delayed for a considerable time where nine witnesses had testified and voluminous documents had been tendered as exhibits, it is not in the best interest of all parties concern and above all justice, that the case be sent back to the session court to be heard again by another judge.

[20] In view of the above, I decided to approach this appeal by examining the record whether there are enough materials to support the conclusion of the trial judge that on the balance of probabilities the appellant had failed to prove her case or whether there are sufficient evidence to support the appellant's claims that the hospital and/or Dr Sabapathy were negligent.

[21] I will first deal with the contention of the appellant on the negligence of Dr Sabapathy.

FAILED TO INSERT A CORRUGATED DRAIN TO DRAIN THE WOUND IN THE FIRST OPERATION WHICH BY ITSELF HAD BROUGHT ABOUT THOSE INFECTIONS AND THAT HE HAD FAILED TO INDICATE THAT A DRAIN IF ANY WAS INSERTED

[22] On this issue it is the appellant's contention that Dr Sabapathy had failed to insert a corrugated drain in the first operation as it was not noted anywhere in the doctor's notes. To substantiate her contention the appellant relied on the evidence of Dr Kylasa Somasundram (DW3) who during cross examination gave evidence that:

> From the records it seemed that the second defendant saw the plaintiff once on 21 December 1985 and he gave orders but no order to remove drain. I agree that no note anywhere that he had removed the drain.
>
> On the assumption that a drain was inserted and removed, there is a failure to record, this is not mentioned in the doctor's order and the nursing report.
>
> It is significant to observe that the dressing was dry and the drain had not served its function. If having observed this is significant to note it down.
>
> If the doctor removed it would be noted somewhere either by the doctor or the nurses.
>
> If a drain had not been inserted in the first operation it would have shown a certain level of incompetence.
>
> Recording by surgeons should be done immediately after the operative procedures and the post operative orders for the nurses.
>
> The infection suffered by plaintiff was not inconsistent with the drain not inserted.

[23] In connection to the above evidence, the appellant then referred to the evidence of Dr Muthukumaran (PW2) the consultant surgeon at Tung Shin Hospital who stated:

If a drain had not been done in the first operation, I do not think the complication that had arisen would have arised.

Inadequate drainage would have caused the infection.

[24] Dr Sabapathy in his evidence testified that the drain was inserted but removed 24 hours later. In examination in chief he said as follows:

When I performed the operation I found there was free blood in the peritoneal cavity. The right ovary had a cyst that had ruptured and the appendix was mildly inflamed. I proceed with the operation. I cleared the peritoneal cavity of the free blood. I excised (removed) the ovarian cyst and then repaired the ovary and removed the appendix. Then clean the peritoneal cavity again. I then put a drain in the wound and closed the incision.

During the operation, I cleaned the peritoneal cavity twice. Normally we do it only once. Here because there was blood I could not see anything, so I had to clean the blood before I could reach the ovary to see if that was the source of the bleeding.

I said I put a drain in the wound. In this particular case it was put so that I could see if there was further bleeding in the ovary. There was no such bleeding after the operation. The drain was there for about 24 hours or less. The drain was removed because there was no bleeding.

[25] The trial judge did not accept the appellant's allegation that Dr Sabapathy had failed to insert a corrugated drain after the first operation. Instead she chosed to belief Dr Sabapathy. On the evidence available, I am in agreement with the trial judge. Dr abapathy testified the evidence drain was inserted and removed 24 hours later which was supported by evidence of DW3. DW3 in his evidence said the following:

Infection of the wound does not necessarily mean improper drainage because the infection is the end result of the interaction of the quantum of bacterial infection against the host resistance against the infection and the support given to host in the form of antibiotic. From my experience, even if a drain is inserted infection can still set in.

[26] In light of the above I am unable to hold that no drain was ever inserted in the first operation as alleged by the appellant.

DR SABAPATHY ALTERED THE MEDICAL RECORDS, AND TEMPERED WITH EVIDENCE

[27] The appellant submitted that the fact Dr Sabapathy altered the medical record and thus tempered with evidence was admitted by Dr Sabapathy himself. The appellant was referring to the evidence of Dr Sabapathy during examination in chief where he said:

The words 'in right gutter' were inserted when I transcribed the notes into type written form.

P13, I typed it myself. It is type written transcription of the hospital notes. In P13, under date 20 December 1985. P12, I typed 'extended medially' but now I say 'extended muscle cutting' is correct.

At the time, I wrote P5 the words 'in right gutter' were not there. I added when I prepared P13, the transcription. I did this about two years back.

[28] From the above, it was the contention of the appellant that Dr Sabapathy altered his notes two years before the trial to suit his contention that a drain had been inserted in the first operation, even though it had not been done. To the appellant, it was an afterthought on the part of Dr Sabapathy because he realized two years before the trial he had been grossly negligent in not inserting a drain in the first operation. As such the appellant contended that P5 and P13 are not reliable documents and Dr Sabapathy is not a credible witness.

[29] However as stated earlier, the trial judge accepted the evidence of Dr Sabapathy that a drain was inserted during the first operation. Thus, the contention of Dr Sabapathy altered the record was rightly rejected by the trial judge. To me, what Dr Sabapathy did when he typed P13 was not altering the medical records or tempered with evidence. He was merely recording what transpired in relation to the operation conducted on the appellant. Dr Sabapathy testified in effect that the drain was inserted but not recorded. According to him at that time he had failed to complete his notes. Thus, only when he prepared his type written note, he inserted the fact that the drain was inserted which according to him was a fact. I have no reasons to disagree.

[30] Again, on the evidence and facts presented at the trial I am unable to conclude that Dr Sabapathy had altered the medical records and tempered with the evidence.

FAILED TO ENSURE IMMEDIATE ADMINISTRATION OF ANTIBIOTIC AFTER THE OPERATION

[31] It is the appellant's contention that there had been undue delay in administering antibiotics after the first operation. According to the appellant that the first administration of antibiotic should be given within the hour of the operation, if not before or during operation. Here, according to the applicant, the first antibiotics was given about nine hours after operation, which contributed to the infection and resulted in the second operation.

[32] It is also the appellant's contention that Dr Sabapathy had failed to insert the word 'stet' for immediate administration of medication in the relevant hospital record and caused further confusion as the administration of that vital dose antibiotics. It is submitted that had the first respondent put the word 'stet', the particular medicine would have been administered immediately.

[33] It is further contended by the appellant that Dr Sabapathy failed to recognize the appellant was deteriorating in health from the 22 December 1985 onwards and that immediate alternative steps ought to have been taken. To the appellant, Dr Sabapathy had failed to supervise the support system of the hospital in ensuring his medical directions were carried out. He failed to leave adequate or any instructions before he went on leave from 28 December 1985 to 6 January 1986. According to the appellant, Dr Sabapathy failed to seek alternative doctor to manage the appellant so that timely operation intervention could be taken place earlier.

[34] Dr Sabapathy testified that the antibiotic were administered without delay. In his evidence, he said to the effect that

(i) that the practice of giving antibiotics in 1985/1986 at the hospital was that as soon as the operation was over, the surgeon write the posts operative treatment which included antibiotic;

(ii) that the first dose was given in the recovering room attached to the operation theatre;

(iii) that there was no practice to give antibiotic injection such a case just before or during the operation unless the case involved a brain, heart or bone replacement surgery; and

(iv) that as far as post operative antibiotics were concerned, the nurses were aware for the practice. According to Dr Sabapathy the word 'stet' did not have to be inserted in the surgeon's instruction to the nurses because it is routine to give the antibiotics immediately without delay.

[35] In his evidence, Dr Sabapathy specifically said that after the first operation he ordered penbritin and netyromycin to be administered on the appellant. Later he changed antibiotics to cefoid because of the rise in the plaintiff's temperature. However he denied that the appellant was having spiking temperature as suggested by PW2. On this issue he said as follows

> I do not agree with PW2 that there was spiking temperature from the first operation up to the second operation. 'Spiking temperature' means when the temperature goes repeatedly above 38 C (100 F). This was not in this case. Before I went on leave drugs were given for the rise in temperature.

[36] Thus from the evidence available, I am unable to accept the appellant's contention that Dr Sabapathy had failed to ensure immediate administration of antibiotic after the operation. As can be seen later in addressing the appellant's contention against the hospital that antibiotic were in fact administered on the appellant.

[37] Now, I will deal with respect of the appellant's contention on the negligence of hospital. The complaints of the appellant may be summarized under two headings:

(i) failure to properly administer adequate and correct antibiotics to prevent post-operative infections; and

(ii) failure to appreciate that conservative treatment of the appellant was not working and that the second operation was needed much earlier than it was performed.

Failure To Properly Administer Adequate And Correct Antibiotics To Prevent Post-Operative Infections

[38] It is the contention of the appellant that there was a total failure to ensure adequate and correct antibiotics administered to her to prevent post operative infections. According to the appellant, the operation was a simple operation for appendicitis. A ruptured ovarian cyst was found and both appendix and ovarian cyst were removed by the hospital. The appellant contended that she should be at the hospital for only about 2–3 days but due to the negligent management of the operation and post operative treatment and care, she landed there for almost a month. To the appellant, the extended stay at the hospital was due to the total failure on the part of the hospital to ensure adequate and correct antibiotics administered to the appellant after the first operation to prevent post operative infections. According to the appellant, the negligent management of the operation and post operative treatment of the appellant made it necessary for the appellant to be admitted at the first respondent for about a month. To the appellant, the failure to ensure adequate and correct antibiotics were administered to her after the first operation was a contributing factor that resulted in the infections and the second operation.

[39] According to the appellant, if flagyl had been administered from the beginning or after the first operation, infection of the wound could have been avoided. According to the appellant, it is evident that despite doctor's instruction to administer flagyl immediately on 25 December 1985, it was only administered to the appellant on 29 December 1985, and that too an inadequate dosage, ie 1/5 of the prescribed dosage. To the appellant, this is gross negligence in the part of the hospital.

[40] In reply, the hospital in gist stated as follows:

(i) It was the duty of Dr Sabapathy to prescribe the antibiotic to which was done. It was not the duty of the hospital to ensure the antibiotics prescribed were the right ones.

(ii) The original antibiotics prescribed were the right one, being merely prophylactic antibiotic — penbritin and netromycin.

(iii) Choice of drugs is dependant on clinical judgment of the doctor.

(iv) There is a body of opinion which supports the view that there is no necessity to give antibiotics for the kind of operation undergone by the appellant.

(v) Antibiotic would not have been necessary in the first place to treat the appellant post-operation. The wrong antibiotic or lack of the same could not have caused the infection which led to the second operation. In fact, intra abdominal infection can still occur despite proper antibiotics cover.

(vi) Penbritin and Netromycin and other medication including Flagyl were dispensed to the appellant in accordance with P14. This was corroborated by

A the Graph Chart P9A, P9B, P9C, and P17. The Color Chart is most reliable. Doctors do not rely on medical sheet; and

(vii) New bottles of Flagyl will only be issued by the pharmacy upon return of empty bottles. There has been no situation where medication was not given.

B **[41]** On this issue whether adequate and correct antibiotic were administer on the appellant, it is relevant to refer what was decided by the trial judge. This is what she stated:

C Daripada keterangan saksi dan dokumen yang dikemukakan khususnya kad-kad seperti 'cardex card' bagi ubatan yang diberi (exh D31); dan suntikan ('injections') yang diberi (exh D35); dan 'observation chart' (exh P9Ac) jelas bahawa rawatan telah diberi oleh pihak DF1. Dari rekod yang diperolehi daripada kad-kad ini jelas jagaan yang dijangka telah pun diberi oleh DF1. Exhibit P14 ('Doctor's Order Sheet') dan exh P8C ('Medicine Sheet') menunjukkan ubatan telah diberikan oleh DF1 seperti diarah DF2, doktor yang bertanggungjawab menjaga plaintif.

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[42] Clearly, the trial judge correctly and adequately took into account all relevant evidence and exhibits in arriving at her finding of facts in favor of the respondent on this issue. Unfortunately, she did it without giving her reasons. But as stated earlier on the evidence and facts available in this case, the hospital could not be said to be E negligent for failure to properly administer adequate and correct antibiotics to prevent post operative infections.

[43] With regard to the non-administration of antibiotics to the appellant, before or after the operation, there is evidence to support the view that there is no necessity F to give antibiotics for the kind of operation undergone by the appellant. PW2 during cross-examination agreed to two passages in the British Medical Journal Vol 280 January-March 1980 (Medical Literature p 29) which provides as follows:

(i) use of prophylactic antibiotics in all cases of acute appendicitis is a questionable value; and

G (ii) if a normal or inflamed appendix is encountered, then appendicectomy should not be followed by any antibiotic treatment.

[44] Further another expert, DW3 in cross-examination stated that it is debatable whether prophylactic antibiotics are needed for removal of a normal and mildly H inflamed appendix. For a straight forward ruptured ovarian cyst, DW3 agrees that it is again debatable whether prophylactic are needed. DW3 agrees that there is a body of opinion which says it is not necessary.

[45] In light of the above evidence, the hospital could not be said to the negligence I because of insufficient antibiotic was administered to the appellant. In any event as found by the trial judge that sufficient antibiotic and/or other required medicine was administered to the appellant. From the record, there are evidence to support the said findings. P14, the doctor's order sheet clearly indicated that sufficient antibiotics, namely netromycin and penbritin and other medication including flagyl were dispensed to the appellant. This was further indicated in the color band in the graph

charts marked as P9A, P9B and P9C for the antibiotics in particular netromycin, penbritin and cefoid and in the table and output chart marked as P17 for flagyl.

[46] P9A, P9B, P9C and P17 were documents tendered by virtue of the system of dispensation in the hospital and evidence was adduced as to the manner the documents were created and recorded. The night supervisor of the hospital, Theresa Paugajshi (DW4) in examination in chief gave evidence as to the procedure adopted in the hospital in respect of administration of medication to their patients. According to him the medication nurse would write the particulars of the patient and the medication on a pink cardex similar as D31 which is used as a reference for the nurses when medication is given. The medication nurse would also write on a white injection card similar to the one marked as D35, the room or bed number of the patient, the date, the name of patient, name of drug and the times to serve the drug. The white injection card is slotted into pigeon holes with the time for administration of the same written on the pigeon holes. When it is due for administration, the drug is put for the intended specific time slot in the compartments. Once the drug has been dispensed to the patient, the white injection card D35 is moved to the next time slot so that the same procedure will then be repeated. According to DW4, that is the system at the hospital.

[47] In cross examination by the appellant's counsel and in re-examination, DW4 gave evidence that the staff nurse on night shift will color a band on the graph chart marked P9A, P9B and P9C for the day to indicate that the particular medication has been dispensed to the patient. This is based on the white injection card having been moved to the last slot in the pigeon hole for the last shift and the existence of the correct quantity of empty bottles.

[48] The trial judge accepted the evidence of DW4 on this issue and decided in favor of the hospital. He accepted DW4 evidence that the color chart is the most reliable to indicate that drug has been dispensed. I have no reason to disagree.

[49] The appellant has attempted to show that there was insufficient flagyl administered on the appellant by virtue of the fact that in the medical sheet (P8) flagyl was recorded as '100 mg' and that certain entries in the medicine sheet were not initialed for other medication like netromycin, penbritin and ceforid. But as submitted by the hospital that failure to complete notes does not indicate negligence. More importantly is that there is ample evidence supporting the hospital's contention that the medicine prescribed had been dispensed. There is the evidence of DW4 which is not challenged that flagyl only comes in 100 ml bottles. Therefore, it is not possible for only 100 gm of flagyl, as recorded in the medical sheet (P8) to be given as opposed to 100 ml. I am also of the view that the non initial of the medicine sheet by the nurses for the antibiotics, netromycin, penbritin and cefoid, does not in any way indicate that those antibiotic have not been dispensed to the appellant. If anything, it indicates a recording carelessness of the nurses. Surely it is not negligence. To me the colour chart supported the evidence that the medicine was dispensed at all times to the appellant. Hence, the applicant contention that the hospital failed to properly administer adequate and correct antibiotic must fail.

Failure To Appreciate That Conservative Treatment Of The Appellant Was Not Working And That The Second Operation Was Needed Much Earlier That It Was Performed

[50] The appellant contended that after the first operation Dr Sabapaty went on leave from 28 December 1985 to 6 January 1986. The second operation was conducted on 7 January 1986 ie 17 days between the first and second operation. According to the appellant, although there were suggestions for an early laparatomy, there were no actions taken by attending doctor, Dr KT Lim, at that time. No explanation was given to the appellant by the hospital. The appellant was made to wait until the second respondent returned from his leave to perform the second operation. The delay in preparing the laparatomy, according to the appellant was not justified. To the appellant, the delay in the second operation was a contributory factor for her internal injuries, pain and suffering.

[51] The hospital in reply contended that whether an early laparatomy had been done was a clinical judgment and in this case Dr KT Lim who relieved Dr Sabapathy when Dr. Sabapathy was away between the period of 28 December 1985 to 5 January 1986 adopted conservative treatment. Thus, according to the hospital, as conservative treatment was adopted, there was no necessity to carry out a laparatomy then.

[52] In this respect, it is pertinent to examine what was said by Dr Sabapathy in his evidence. He said that when he returned to work he continued that conservative treatment adopted by Dr KT Lim. However on 7 January 1986, he decided to operate as an infection had localized. He said:

> I terminated conservative treatment because after the evening of the 6 January 1986 she started vomiting again and there was persistent tenderness on the right iliac fossa. This indicated there is a possibility of some pathology (infection) in this area. There is a great possibility that conservative treatment might have helped but would have taken longer period. I decided to operate because of the infection had already localized.

[53] I am in agreement with the hospital on this issue. In this case the appellant was not left unattended. Conservative treatment was adopted by Dr KT Lim. Surely, sufficient time had to be given in order to determine whether conservative treatment was working on the appellant. With regard to the suggestion that early laparatomy should have been performed on the appellant, Dr Sabapathy said:

> If laparatomy had been taken instead of conservative treatment, it would have resulted in more complication.

[54] Thus, to me whether early laparatomy must be carried out instead of adopting conservative treatment was a clinical decision. Different opinion always exists. If one treatment overtakes the other and goes wrong, it cannot be a basis for a conclusion of negligence.

[55] Thus, if there was a delay, the delay was due to the conservative treatment under taken by Dr KT Lim. DW3 opined that a second operation should be carried

out if there is evidence of complete intestinal obstruction but in this case, he noted from the documents submitted to him that there was no indication of complete intestinal obstruction. Further DW3 in his examination in chief stated that there was evidence of spepticaemia on 28 December 1985 in the plaintiff. According to him, with spepticaemia it is dangerous to perform a laparatomy on the plaintiff. The expert witness for the appellant, PW2 concurred with the view. PW2 stated that:

(i) it would be dangerous to perform a laparatomy if there was spepticaemia and one of the diagnosis for spepticaemia is by x-ray; and

(ii) it is not necessary to do a laparatomy to find the cause of spepticaemia.

[56] As stated earlier, the decision whether to operate or not is a matter of clinical judgment of the attending doctor. It is for the attending doctor to decide based on the circumstances of the case at that time. To me, the conservative treatment undertook by Dr KT Lim was an acceptable and reasonable practice in such circumstances.

[57] The appellant's expert, PW2 may have a different view on this matter. But the different of opinion as to the treatment of a patient does not make a doctor negligent merely because his opinion leading to his diagnosis differs from that of other doctors. What is important is he acts with the ordinary care and skill of a doctor with his qualification. In *Hucks v Cole and Author* [1968] 112 SJ 483, Lord Denning MR stated the following:

> A doctor was not to be held negligent simply because something went wrong. He was not liable for mischance or misadventure, nor for error of judgment. He was only liable if he fell below the standards of a reasonable competent practitioner in his field, so much so that his conduct was deserving of censure or inexcusable.

[58] What Dr KT Lim had decided then was his clinical judgment. In fact it would be wrong on his part to proceed with laparatomy operation without attempting a conservative treatment. In *Schanczl v Singh* [1988] 2 WWR 465 (Alta QB) a Canadian case, the defendant surgeon was held negligent for fairly to attempt a conservative treatment before resorting to spinal surgery. In Schanczl, the patient was referred to the defendant due to persistent pain in his lower back and his left leg. Instead of recommending conservative management such as bed rest, muscles relaxants, heart and traction, the defendant proceeded with myelogran and spinal surgery, Marshall J state the following:

> For a specialist to plunge ahead and operate in the circumstances was exercising entirely undue haste… A surgeon is retained to perform surgery, but also to avoid performing surgery in the appropriate circumstances.

[59] Thus, I am of the view, that the allegation made by the appellant in respect of the conservative treatment, timing of the second operation and the early laparatomy all involved clinical judgment. The hospital cannot be faulted where such judgments were exercised.

[60] It is for the above-reasons, I am also of the view that the maxim of res ipsa loquitor or 'the things speaks for itself' is not applicable in this case. It is the appellant's contention that the maxim of res ipsa loquitor applies in this case as on the facts there are evidence of the 'thing' namely:

(i) Dr Sabapathy failed to insert a corrugated drain in the first operation;

(ii) delay in administering antibiotics after the first operation;

(iii) omission to insert the word 'stet' for the immediate administration of medication;

(iv) failure to ensure adequate and correct antibiotics were administered;

(v) undue delay in the performance of the second operation;

(vi) failed to appreciate the ineffectiveness of conservative treatment;

(vii) failure by both respondents to recognize that the appellant was deteriorating in health and immediate alternative steps ought to have been taken;

(viii) failure of Dr Sabapathy to supervise the support system of the hospital in ensuring his medical directions were carried out. He even failed to leave adequate or any instructions before he went on leave.

[61] To support the arguments, the appellant relies on the following cases to say that the maxim applies to medical negligence cases:

(i) *Cassidy v Ministry of Health* [1951] 1 All ER at p 577 ([Tab 2, Jilid 2, appellant's BOA])

> I have gone straight to the result because, in my opinion, on the basis that the hospital was responsible for all those in whose charge the plaintiff was, the surgeon, doctor and nurses, the result seems to me to raise a case of res ipsa loquitor.

(ii) *Mahon v Osborne* [1939] 2 KB 14 at p 22 where the court referred to *Ballard v North British Railway Co* (1923) SC (HL) 53. Lord Dunedin said:

> Whether the expression res ipsa loquitor is applicable or not depends upon whether in the circumstances of the particular case, the mere fact of the occurrence which cause hurt or damage is a piece of evidence relevant to infer negligence… Where complete control rests with the defendant and it is the general experience of mankind that the accident in question does not happen without negligence, the maxim may well apply.

[62] I am of the view that the maxim of res ipsa loquitor does not apply in this case. To me, the fact that the patient came out of a hospital in a worse condition before

admittance does not constitute proof of negligence by the hospital staff. One must be able to accept that medical treatment carries the risk and the occurrence of injury is not necessarily evidence of lack of reasonable care.

[63] For the above-reasons, the appellant's appeal was dismissed with costs.

Appeal dimissed with costs.

Reported by Peter Ling